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Actions Have Consequences: Waiver and Estoppel in United States Courts in the Context of Commercial Arbitration

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RESUMO: O *waiver* e o *estoppel* são doutrinas jurídicas aceitadas nos Estados Unidos que podem impedir ou forçar a arbitragem, respeitivamente. Este artigo tem o objetivo de apresentar uma visão global do *waiver* e o *estoppel* e as formas nas quais estas doutrinas são aplicadas pelas cortes estadounidenses, começando com um quadro geral para a arbitragem nos Estados Unidos e os princípios fundamentais que as partes devem ter em conta. O *waiver* e o *estoppel* estão intimamente relacionados, visto que ambas doutrinas se baseam nas tentativas das partes de procurar ou evitar os procedimentos arbitrais; portanto, as ações das partes podem ter a consequência de impedir ou forçar a arbitragem, dependendo das circunstâncias. Porém, apesar de certas similaridades entre as duas doutrinas, existem diferenças substanciais em termos de quem decide as questões do *waiver* ou do *estoppel* (as cortes ou os árbitros), as normas legais relevantes, e a lei aplicável. Este artigo proporciona orientação sobre estes pontos, baseada na jurisprudência e nos estudos acadêmicos.

ABSTRACT: Waiver and estoppel are recognized legal doctrines in the United States that may prevent arbitration (waiver) or compel arbitration (estoppel). This article presents an overview of waiver and estoppel as interpreted and applied by United States courts, beginning with the general framework for arbitration in the United States and key background principles parties should bear in mind. Waiver and estoppel are closely related because both rely on the parties' conduct in seeking or avoiding arbitration; hence, parties' actions may have the consequence of forbidding or requiring arbitration, depending on the circumstances. However, despite certain similarities between these doctrines, there are important differences in terms of who decides waiver and estoppel questions (the courts or arbitrators), the relevant legal standards and the applicable law. This article provides guidance on each of these points based on case law and scholarship.

SUMMARY: I – Introduction; II – General framework and background principles; A) The U.S. legislative framework; B) Threshold questions: arbitrability and applicable law; III – How a party can lose its right to arbitration: waiver; A) Who decides whether a party waived its right to arbitration: the question of arbitrability; B) What law applies in the determination of whether a party waived its right to arbitrate; C) What it means for a party to act in a manner inconsistent with its right to arbitrate; D) What constitutes prejudice to the party opposing arbitration; IV – Compelling arbitration through theories of equitable estoppel; A) What is equitable estoppel: basic principles; B) Who decides whether equitable estoppel applies: the question of arbitrability; C) What law applies to the equitable estoppel analysis; D) Equitable estoppel as a shield: signatories compelling non-signatories to arbitrate; E) Equitable estoppel as a sword: non-signatories compelling signatories to arbitrate; V – Concluding remarks.

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1 The views expressed herein are the author's own and do not necessarily reflect those of the firm or its clients. The paper reflects comments delivered at the Young Arbitrators panel at the XIII International Arbitration Congress of the Brazilian Arbitration Committee on September 21, 2013 in Porto de Galinhas, Brazil. The author wishes to thank Jordan Wall and Peter Horn, both associates in the International Arbitration and Litigation Department, for their assistance in preparing this paper.

I – INTRODUCTION

Actions and non-actions by parties and non-parties can have consequences, and parties who may find themselves haled before a court in the United States in a dispute where an arbitration clause exists may find themselves involved in disputes about arbitrability.

Waiver and estoppel are recognized legal doctrines in the United States that may prevent arbitration (waiver), on the one hand, or compel arbitration (estoppel), on the other. In some ways, these doctrines may be viewed as two sides of the same coin: waiver takes away the right to arbitrate from a party who acted inconsistently with such right, while estoppel imposes arbitration onto a party who acted as though it were party to the arbitration agreement. These concepts are closely related because both rely on the parties' conduct. However, there are important differences between these doctrines as regards, for example, who decides the issue – arbitrators or U.S. courts – the relevant legal standards and the applicable law.

This article discusses the framework of waiver and estoppel as developed by the U.S. courts in the context of commercial arbitration. Part II addresses the legislative framework in place in the United States. Part III discusses waiver. Part IV covers estoppel, outlining the doctrine as applied to signatories and non-signatories to arbitration agreements.

II – GENERAL FRAMEWORK AND BACKGROUND PRINCIPLES

A) The U.S. legislative framework

The Federal Arbitration Act ("FAA")[2], enacted in 1925, represents the cornerstone of U.S. arbitration legislation, governing contracts involving interstate or international commerce. The FAA establishes two pillar principles, which in many ways can be said to have informed the manner in which U.S. courts developed their jurisprudence with respect to waiver and estoppel (among other doctrines).

First, the FAA expresses a strong federal presumption of arbitrability of disputes, providing that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract[3]". The U.S. Supreme Court has interpreted this provision to reflect a "liberal policy in favor of arbitration[4]". This pro-arbitration

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2 9 U.S.C. §§ 1-16, 201-08, 301-07 (2012) (enacted in 1925).
3 9 U.S.C. § 2.
4 *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1742 (2011) (quoting *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

presumption[5] has led courts to require a party wishing to invoke waiver to bear a heavy burden of proof[6].

Second, the FAA establishes that arbitration agreements are enforceable contracts, and as such they are subject to the same rules and considerations as any other contract[7]. The corollary of this principle is that courts place singular importance on indications of consent and of a manifestation to be bound to the arbitral agreement when interpreting it and the parties' conduct[8]. This notion of consent is particularly evident in the courts' analysis of whether estoppel is properly asserted.

B) Threshold questions: arbitrability and applicable law

Two additional background principles should be discussed upfront, as they represent threshold questions to the determination of whether waiver or estoppel apply.

As interpreted by the U.S. Supreme Court, arbitrability refers to the question of *who* decides questions of waiver and estoppel (or for that matter other issues related to the arbitration agreement or to parties' dispute): the U.S. courts or the arbitrators? In recent years the question of arbitrability has developed into a complex area of "gateway issues[9]".

With its dual system of courts and law – federal and state – parties in the United States need also to determine which body of law applies to questions of waiver and estoppel. In general, U.S. courts have applied *federal* common

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5 To be clear, this pro-arbitration presumption generally applies to questions of scope of an arbitration agreement, but not necessarily to questions of existence or validity of the arbitration agreement. *See, e.g.*, *Griswold v. Coventry First LLC*, 762 F.3d 264, 271 (3d Cir. 2014) ("The presumption in favor of arbitration does not extend, however, to non-signatories to an agreement; it applies only when both parties have consented to and are bound by the arbitration clause."); *Flintkote Co. v. Aviva PLC*, 769 F.3d 215, 220 n.3 (3d Cir. 2014) ("Although a presumption in favor of arbitration exists, that presumption applies only when interpreting the scope of an arbitration agreement, and not when decided whether a valid agreement exists."); *Republic of Iraq v. BNP Paribas USA*, 472 F. App'x 11, 14 (2d Cir. 2012) (denying motion to compel arbitration based on third-party beneficiary theory and observing that "[w]here, as here, 'the parties dispute not the scope of an arbitration clause but whether an obligation to arbitrate exists,' the general presumption in favor of arbitration does not apply").

6 *See, e.g.*, *Patten Grading & Paving, Inc. v. Skanska USA Bldg., Inc.*, 380 F.3d 200, 204 (4th Cir. 2004) (based on the FAA and "strong federal policy favoring arbitration," "[t]he party opposing arbitration on the basis of waiver thus bears a heavy burden") (quotation marks and citation omitted); *Petroleum Pipe Americas Corp. v. Jindal Saw, Ltd.*, 575 F.3d 476, 480 (5th Cir. 2009) ("A presumption against waiver exists such that the party asserting waiver bears a heavy burden of proof in its quest to show waiver.") (quotation marks and citation omitted). *See also* Gary B. Born, International Commercial Arbitration 875 (2014) (noting that the party seeking to establish waiver "bears a heavy burden of proof, particularly in cases under the New York Convention").

7 9 U.S.C. § 2. *See also Kresock v. Bankers Trust Co.*, 21 F.3d 176, 178 (7th Cir. 1994) ("An agreement to arbitrate is treated like any other contract.") (citing Section 2).

8 *See, e.g.*, *Volt Info. Sciences, Inc. v. Bd. of Tr. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989) (stating that "[a]rbitration under the [Federal Arbitration] Act is a matter of consent"). *See also* Born, *supra* note 6, at 793 ("T]he essential issue in determining the existence of an arbitration agreement is whether the parties have consented to *that agreement* (to arbitrate), as distinguished from having consented to the *underlying contract*.") (emphasis in original).

9 *See generally* Timothy G. Nelson, *Navigating the "Gateway" to International Arbitration in the U.S. Courts – A Decade of Adventures, Post*-Howsam, 8 World Arb. & Mediation Rev., nº 1 2014, at 49; George A. Bermann, *The "Gateway" Problem in International Commercial Arbitration*, 37 Yale J. of Int'l L. 1 (2012).

law (*i.e.*, the law developed by the decisions of federal courts) to questions of waiver, and *state* law to estoppel. This is an important consideration parties need to be mindful of because there may be significant differences between the laws of each of the 50 states, and between the laws of each of those states and federal law.

III – HOW A PARTY CAN LOSE ITS RIGHT TO ARBITRATION: WAIVER

A) Who decides whether a party waived its right to arbitration: the question of arbitrability

The answer to who decides whether a party waived its right to arbitrate its dispute is "it depends." It depends on the case and on the particular circumstances.

On the one hand, the FAA suggests that waiver may be a matter for the courts to decide, providing in Section 3 that courts are empowered to stay actions pending arbitration if the applicant "is not in default in proceeding with such arbitration"[10], presumably entitling courts to determine if a default has indeed occurred, with the term "default" generally understood to refer to waiver of the right to arbitrate. On the other hand, the U.S. Supreme Court in the seminal case of *Howsam v. Dean Ritter Reynolds, Inc.*, held that "procedural questions" are presumptively for arbitrators to decide, such procedural questions being "waiver, delay, or a like defense to arbitrability"[11]. More recently, in *BG Group, PLC v. Republic of Argentina*, the U.S. Supreme Court drew a distinction between "disputes about arbitrability" (meaning whether a party is bound to an arbitration clause or whether a particular type of dispute is subject to arbitration) and "disputes about the meaning and application of particular procedural preconditions for the use of arbitration" (meaning waiver, delay, time limits, notice, laches and other conditions precedent to an obligation to arbitrate). The former are presumptively for the courts to decide and the latter are presumptively left to the arbitrators to determine[12].

A number of U.S. Courts of Appeals have held that courts should decide waiver questions resulting from litigation conduct, while arbitrators should generally decide waiver questions stemming from failure to comply with pre-conditions to arbitration[13]. As one commentator has stated, "*Howsam*

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10 9 U.S.C. § 3. *See also Marie v. Allied Home Mortg. Corp.*, 402 F.3d 1, 14 (1st Cir. 2005) (stating that this language seems to command courts to decide waiver issues themselves).

11 537 U.S. 79, 84 (2002) (citing *Moses H. Cone*, 460 U.S. at 24). *See, e.g.*, *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384, 393-94 (2d Cir. 2011) (holding that waiver and estoppel issues were for arbitrator to decide because there was "clear and unmistakable evidence" that the parties intended these issues to be arbitrated in the first instance).

12 134 S. Ct. 1198, 1206-07 (2014).

13 *See Marie*, 402 F.3d at 14; *Ehleiter v. Grapetree Shores, Inc.*, 482 F.3d 207, 218-19 (3d Cir. 2007); *JPD, Inc. v. Chronimed Holdings, Inc.*, 539 F.3d 388, 393-94 (6th Cir. 2008); *Grigsby & Assocs., Inc. v. M Sec. Inv.*, 693 F.3d 1316, 1354 (11th Cir. 2012). *See also Doctor's Assocs., Inc. v. Distajo*, 66 F.3d 438, 453-57 (2d Cir. 1995) (noting that waiver "is generally referable to the arbitrators" where a party moves to compel arbitration under Section 4 of the FAA, but holding that the waiver issue was for the court where a party had been involved in prior litigation).

suggested that waiver was a matter for the arbitrators, but some subsequent circuit and district cases have distinguished this rule by suggesting that, where waiver consists of litigation conduct (*i.e.*, pursuing a court case in disregard of the arbitration clause), then the court should decide whether waiver has occurred"[14]. In 2011, the Second Circuit, the federal appellate court sitting in New York, held that waiver is for the arbitrators to decide when the alleged waiver arose from past and concluded litigation[15].

B) What law applies in the determination of whether a party waived its right to arbitrate

To date U.S. federal courts have viewed the applicable law to waiver matters as being federal common law[16]. The FAA, however, does not provide substantive guidance as to what specifically constitutes waiver (termed "default" in the FAA). Accordingly, the parameters of what behavior amounts to waiver have been left to the courts to establish, often leading to varied and sometimes conflicting jurisprudence, as discussed below. That said, courts appear for the most part to focus on behavior that is inconsistent with the right to arbitration and causes prejudices to the party opposing arbitration. The most frequent formulation of the test is two-pronged: "First we decide if, under the totality of the circumstances, the party has acted inconsistently with the arbitration right, and second, we look to see whether, by doing so, that party has in some way prejudiced the other party"[17].

C) What it means for a party to act in a manner inconsistent with its right to arbitrate

For the most part, courts consider the invocation of the "litigation machinery" as an action which is inconsistent with the right to arbitrate[18]. However, where courts differ is in their interpretation of the extent to which a party may use the litigation regime before losing its right to arbitrate. As one

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14 Nelson, *supra* note 9, at 57. *See also* Bermann, *supra* note 9, at 42 ("A good number of courts have drawn a distinction between contract-based waiver and conduct-based waiver, holding that the former is for the arbitral tribunal to decide, while the latter may be determined at the threshold by a court.").

15 *See Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384, 394 (2d Cir. 2011).

16 *See, e.g.*, *Doctor's Assocs., Inc. v. Distajo*, 107 F.3d 126 (2d Cir. 1997) (deciding waiver based on federal common law); *Republic Ins. Co. v. PAICO Receivables, LLC*, 383 F.3d 341 (5th Cir. 2004) (same); *Ivax Corp. v. B. Braun of Am., Inc.*, 286 F.3d 1309, 1315-16 (11th Cir. 2002) (same). To note, however, that while waiver is determined by federal common law, the laws of a particular state (or foreign law) may otherwise govern the arbitration agreement, including questions of formation and validity. *See* Born, *supra* note 6, at 882.

17 *Ivax Corp.*, 286 F.3d at 1315-16 (internal quotation marks and citations omitted). Similarly, the Court of Appeals for the Sixth Circuit described its two part test as follows: "[A] party may waive an agreement to arbitrate by engaging in two courses of conduct (1) taking actions that are completely inconsistent with any reliance on an arbitration agreement; and (2) delaying its assertion to such an extent that the opposing party incurs actual prejudice." *Johnson Assocs. Corp. v. HL Operating Corp.*, 680 F.3d 713, 718 (6th Cir. 2012) (citations and internal quotation marks omitted). The Court of Appeals for the Third Circuit uses a series of factors: "(1) the extent of the party's personal responsibility; (2) the prejudice to the adversary caused by the failure to meet scheduling orders and respond to discovery; (3) a history of dilatoriness; (4) whether the conduct of the party of the attorney was willful or in bad faith; (5) the effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions; and (6) the meritoriousness of the claim or defense." *Hoxworth v. Blinder, Robinson & Co., Inc.*, 980 F.2d 912, 919 (3d Cir. 1992).

18 *See, e.g.*, *Garcia v. Wachovia Corp.*, 699 F.3d 1273, 1277 (11th Cir. 2012) ("A party acts inconsistently with the arbitration right when the party substantially invokes the litigation machinery prior to demanding arbitration.").

court commented, "[t]here is no bright-line rule for a waiver of arbitral rights, and each case is to be judged on its particular facts[19]". Generally, however, the line tends to be drawn at the pursuit of discovery that is not available in arbitration. Accordingly, waiting until just before discovery is completed to invoke the right to arbitration will likely be held to be inconsistent with said right, particularly when the party opposing arbitration has been subjected to depositions or forced to litigate arbitrable issues[20].

Other behaviors courts have found to be inconsistent with the arbitration right are when a party initiates litigation and delays asserting its right to arbitration, or when a party first resists arbitration or claims that the arbitration agreement is void or inapplicable and subsequently attempts to compel arbitration. However, courts across the United States have been inconsistent in establishing what amount of delay or engagement in litigation is sufficient for waiver. Thus, for example, engaging in four years of litigation, accompanied by aggressive tactics prior to any invocation of the right to arbitrate, constituted waiver[21]. However, a delay of three years has been held to be insufficient for waiver purposes, at least where the party opposing arbitration cannot prove that it suffered prejudice, since in light of the strong federal policy favoring the enforcement of arbitration agreements, the court reasoned that "delay standing alone is an insufficient basis to support waiver[22]". A relatively short delay, however, may be sufficient for waiver purposes if a party initially denies any arbitration agreement. For instance, one court has found waiver despite a delay of only two months, but where the party moving for arbitration had filed a third-party complaint, replied to the third-party answer, complied with pre-trial orders and denied the existence of a contract or binding arbitration agreement[23]. Similarly, a party's failure to take advantage of an opportunity to compel arbitration may constitute waiver if the party later changes course. In one case, a court found waiver where the party seeking arbitration had twice declined the court's invitation to move to compel arbitration, but one year later – following a favorable decision by the U.S. Supreme Court – moved to

19 *Joca-Roca Real Estate, LLC v. Brennan*, 2014 WL 6737103, at *5 (1st Cir. Dec. 1, 2014) (finding waiver based on the fact that the party in trying to avail itself of arbitration had previously filed its complaint in federal court, conducted significant discovery and only then moved to compel arbitration after discovery had closed, just two months prior to trial).

20 *Com-Tech Assocs. v. Computer Assocs. Itn'l, Inc.*, 938 F.2d 1574, 1576-77 (2d Cir. 1991) (waiving party raised the issue of arbitration 18 months after answering the complaint, deposed the opposing party extensively and forced that party to incur significant additional expenses by litigating arbitrable issues). *See also Joca-Roca*, 2014 WL 6737103.

21 *Kramer v. Hammond*, 943 F.2d 176, 179 (2d Cir. 1991) (finding waiver where, prior to invoking the arbitration clause, the party had engaged in "aggressive, protracted litigation" as it had "litigated issues to the highest state courts of New York and South Carolina, and had petitioned the United States Supreme Court for a writ of certiorari").

22 *Shearson Lehman Hutton, Inc. v. Wagoner*, 944 F.2d 114, 122 (2d Cir. 1991). In *Shearson*, the party opposing arbitration participated in discovery related to a different party's claims against it, where that other party shared the same counsel with the party moving to compel arbitration. Thus, it was argued that the moving party had access through its counsel to the discovery in the other action and that it knew of the arbitration agreement three years before moving to compel arbitration. But the court concluded that this "participation in discovery is more attenuated – only present because two parties hired the same counsel," and because these were separate parties that did not present the same claims, the party opposing arbitration could not demonstrate that the party moving to compel arbitration was the party who caused the alleged prejudice. *Id.*

23 *Supermedia v. Affordable Elec., Inc.*, 565 F. App'x 144, 148 (3d Cir. 2014).

dismiss the claims in favor of arbitration or to stay the court proceedings pending arbitration[24].

In sum, in trying to discern what it means for a party to have "substantially invoked" the litigation machinery, U.S. courts tend not only to look to specific behavior, but also strive to discern the party's intention whether to submit its dispute to arbitration or litigation. As one court has stated, "[t]o invoke the judicial process, the party must, at the very least, engage in some overt act in court that evinces a desire to resolve the arbitrable dispute through litigation rather than arbitration"[25]. In this regard, the "substantial invocation" standard could be said to emphasize the fundamental requirements of consent and a manifestation to be bound to arbitrate.

C) What constitutes prejudice to the party opposing arbitration

Currently, the federal appellate courts in the United States are split as to the question of whether prejudice to the party opposing arbitration is necessary in order for waiver to apply. In 2011, the U.S. Supreme Court granted certiorari in *Stok & Associates, P.A. v. Citibank, N.A*[26] to evaluate the matter, however the parties settled before the Court could hear and determine the case, and in 2014 the U.S. Supreme Court denied certiorari in *Richards v. Ernst & Young, LLP*[27]. Short of Supreme Court guidance, it remains possible that prejudice will be a factor in the waiver analysis.

The majority of federal appellate courts in the United States have held that prejudice is necessary to establish waiver: U.S. Court of Appeals for the First, Second, Third, Fourth, Fifth, Sixth, Eighth, Ninth and Eleventh Circuits have required a showing of prejudice[28], while the U.S. Court of Appeals for the Seventh, Tenth and D.C. Circuits have held that prejudice is not required[29].

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24 *Garcia*, 669 F3d at 1275-77. At the second opportunity, the waiving party went as far as to state that it "did not move for an order compelling arbitration ... nor does it intend to seek arbitration of [the] claims in the future." *Id.* at 1276.

25 *PAICO Receivables*, 383 F.3d at 344. In *PAICO*, the court held that a party had invoked the judicial process when it did not demand arbitration, opposed a protective order that would have limited the court proceedings to the issue of whether an arbitration agreement existed and sought to litigate all the issues in the case. *Id.* at 345-46.

26 131 S. Ct. 1556 (2011) (granting certiorari); 131 S. Ct. 2955 (2011) (dismissing certiorari). As stated by petitioner, the question for the Court was "Under the Federal Arbitration Act ("FAA"), should a party be required to demonstrate prejudice after the opposing party waived its contractual right to arbitrate by participating in litigation, in order for such waiver to be binding and irrevocable?" Petition for Certiorari at i (nº 10-514) (Oct. 14, 2010).

27 135 S. Ct. 355 (2014). The questions, as framed by petitioner, were: "1. Should a party be required to demonstrate prejudice after the opposing party waived its contractual right to arbitrate by participating in litigation, in order for such waiver to be binding and irrevocable? [Certiorari previously granted]. 2. If 'prejudice' is required, what constitutes sufficient 'prejudice' in order to find waiver?" Petition for a Writ of Certiorari at i (nº 13-1274) (Apr. 21, 2014).

28 *See In re Tyco Int'l Ltd. Sec. Litig.*, 422 F.3d 41 (1st Cir. 2005); *Thyssen, Inc. v. Calypso Shipping Corp., S.A.*, 310 F.3d 102 (2d Cir. 2002); *Ehleiter*, 482 F.3d 207 (3d Cir. 2007); *Patten Grading & Paving*, 380 F.3d 200 (4th Cir. 2004); *Cargill Ferrous Int'l v. Sea Phoenix MV*, 325 F.3d 695 (5th Cir. 2003); *Manasher v. NECC Telecom*, 310 F. App'x 804 (6th Cir. 2009); *Lewallen v. Green Tree Servicing, L.L.C.*, 487 F.3d 1085 (8th Cir. 2007); *Richards v. Ernst & Young, LLP*, 744 F.3d 1072 (9th Cir. 2013), *cert. denied*, 135 S. Ct. 355 (2014); *Ivax Corp.*, 286 F.3d 1309 (11th Cir. 2002).

29 *See Cabinetree of Wisc., Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388 (7th Cir. 1995); *Reid Burton Constr., Inc. v. Carpenters Distr. Council of So. Colo.*, 614 F.2d 698 (10th Cir. 1980); *Nat'l Found. for Cancer Research v. A.G. Edwards & Sons, Inc.*, 821 F.2d 772 (D.C. Cir. 1987).

In determining whether a party has suffered prejudice, courts look to a number of facts, such as the length of delay in demanding arbitration and the expense incurred by that party from participating in the litigation process.[30] As one court explained, "[p]rejudice may be substantive, such as when a party loses a motion on the merits and then attempts, in effect, to relitigate the issue by invoking arbitration, or it can be found when a party too long postpones his invocation of his contractual right to arbitration, and thereby causes his adversary to incur unnecessary delay or expense"[31]. Some circumstances that have given rise to prejudice are when a party uses discovery procedures that are unavailable in arbitration and where a party has incurred the types of costs that arbitration is designed to alleviate, such as costs associated with extensive document production or depositions[32].

Prejudice must be proven, for example by introducing expenses incurred in litigating[33]. Moreover, a party opposing arbitration needs to establish a causal link between the other party's litigation activities (*i.e.*, depositions and document production) and the actual prejudice suffered[34]. For example, as one court has stated, waiver cases normally involve expenses "specifically in response to motions filed by the party who later seeks arbitration"; there, the (unsuccessful) party opposing arbitration "ha[d] provided no evidentiary support for her claimed 'significant expense'"[35].

IV – COMPELLING ARBITRATION THROUGH THEORIES OF EQUITABLE ESTOPPEL

A) What is equitable estoppel: basic principles

Equitable estoppel in the United States finds its foundation in notions of fairness, whereby a party may be barred from acting inconsistently with its own actions[36]. The principles underpinning equitable estoppel may find some similarities with those at the basis of certain civil law doctrines, such as *venire contra factum proprium*, which however is still a distinguishable doctrine[37].

30 *Garcia*, 699 F.3d at 1277 (internal quotation marks and citations omitted).

31 *Johnson Assocs.*, 680 F.3d 713 at 720 (internal quotation marks and citations omitted).

32 *See Garcia*, 699 F.3d at 1277-78. The court stated that "[t]here is no doubt that these plaintiffs expended substantial sums of money in conducting this litigation," which to that point had involved discovery for more than a year, including 20 depositions and the production of approximately 900,000 pages of documents. *Id. See also Johnson Assocs.*, 680 F.3d at 720-21 (finding prejudice where there were numerous scheduling motions, a court-supervised settlement discussions and discovery beyond that permitted in arbitration).

33 *See, e.g.*, *Citibank, N.A. v. Stok & Assocs., P.A.*, 387 F. App'x 921, 925 (finding no prejudice when the party opposing arbitration "has done little to demonstrate the amount of expenses incurred", and when asked at oral argument, the party "could not point to any portion of the record that reveals either the amount of money it spent or the number of hours it dedicated to conducting litigation-specific discovery and preparing litigation-specific documents").

34 *Rota-McLarty v. Santander Consumer USA*, 700 F.3d 690, 703-04 (4th Cir. 2012).

35 *Id.* at 703.

36 *See* Williston on Contracts § 8.3 (4th ed. 2008) ("The doctrine of equitable estoppel exists to prevent fraud or injustice; to the extent that a party has made a statement or acted in a particular way, it is unjust and tantamount to fraud to permit that party thereafter to allege and prove facts contrary to its previous statements.").

37 "That is, no person may act in contradiction with its own previous conduct without consequences." Julian D.M. Lew, Loukas A. Mistelis & Stefan M. Kröll, Comparative International Commercial Arbitration 684 n.125 (2003). *See also* Born, *supra* note 6, at 1477 ("C]ivil law jurisdictions do not necessarily recognize the estoppel doctrine

U.S. courts have applied the doctrine of equitable estoppel to preclude an actor from denying that it is party to an arbitration agreement when it has acted as though it *were* party to it. The doctrine of equitable estoppel in arbitration has taken two basic forms: it has been used by signatories to arbitration agreements to compel arbitration with non-signatories (as a "sword"), and by non-signatories to compel arbitration with signatories (as a "shield")[38].

B) Who decides whether equitable estoppel applies: the question of arbitrability

Whether a court or an arbitrator determines questions of equitable estoppel depends on if the parties intended or not to submit the matter to arbitration. In *BG Group*, the U.S. Supreme Court stated that courts presume that parties intend for arbitrators to decide issues relating to preconditions to arbitration, including "prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate"[39]. However, to some extent courts have played a greater "gateway" role in matters involving non-signatories, meaning that courts may not easily infer consent when the party opposing arbitration has not signed the arbitration agreement[40]. Indeed, in *BG Group*, the U.S. Supreme Court observed a presumption that parties intend courts, not arbitrators, to decide disputes about arbitrability, including "questions such as 'whether the parties are bound by a given arbitration clause'"[41]. Estoppel therefore may be regarded as an issue for the courts where there is no clear evidence that the parties agreed to arbitrate the issue of arbitrability[42]. Indeed, the Second Circuit has held that courts should independently review the issue of consent to arbitrate the enforceability of a foreign award where the losing parties were not signatories to the arbitration agreement[43]. Similarly, with respect to non-

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as such. Nonetheless, the principles of good faith and equity or fairness that underlie the doctrine are universal, and are recognized, among other things, in the New York Convention."); Yves Derains & Eric A. Schwartz, Guide to the ICC Rules of Arbitration 379 (2d ed. 2005) (discussing waiver under the ICC Rules and stating that Article 33 "expresses the widely-accepted principle (known variously, *e.g.*, as waiver, estoppel, *venire contra factum proprium*) that a party should not be permitted to complain long after the fact of irregularities as to which it did not raise any objection when it originally could have") (emphasis in original).

38 Born, *supra* note 6, at 1472-75 (discussing estoppel and its application in U.S. courts, and describing the two basic applications as a "shield" and a "sword"). *See also* Bernard Hanotiau, Complex Arbitrations: Multiparty, Multicontract, Multi-Issue and Class Actions ¶¶ 41-54 (2005) (describing estoppel doctrine, United States cases and describing estoppel as a "sword" when compelling a non-signatory).

39 134 S. Ct. at 1207.

40 Nelson, *supra* note 9, at 62-63. For a general discussion of consent and compelling arbitration against signatories and non-signatories, see Alan Scott Rau, *"Consent" to Arbitral Jurisdiction: Disputes with Non-Signatories*, *in* Multiple Party Actions in International Arbitration 69, 111-35 (Belinda MacMahon ed., 2009).

41 134 S. Ct. at 1206 (quoting *Howsam*, 537 U.S. at 84).

42 *See Kramer v. Toyota Motor Corp.*, 705 F.3d 1122, 1127 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 62 (2013) (holding that arbitrability of estoppel issue was for the court where "the arbitration agreements do not contain clear and unmistakable evidence" that the parties agreed to arbitrate arbitrability, and holding that non-signatory could not compel arbitration). *See also First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) ("Courts should not assume that the parties agreed to arbitrate arbitrability unless there is clea[r] and unmistakabl[e] evidence that they did so.") (citation omitted) (alterations in original); *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986) ("The question of arbitrability ... is undeniably an issue for judicial determination. Unless the parties clearly and unmistakenly provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator.").

43 *Sarhank Grp. v. Oracle Corp.*, 404 F.3d 657, 660-62 (2d Cir. 2005) (holding that courts should decide whether a non-signatory can be bound to arbitrate under American contract law or American agency law).

-signatories attempting to compel arbitration, the Second Circuit also stated that "[w]here the party seeking arbitration is not a party to the arbitration agreement, the question of arbitrability is for the court, not the arbitrator"[44].

C) What law applies to the equitable estoppel analysis

As the FAA establishes, arbitral agreements are subject to the same rules and considerations as any other contract. Indeed, as stated by the U.S. Supreme Court in *Arthur Andersen LLP v. Carlisle*, "traditional principles of state law allow a contract to be enforced by or against nonparties to the contract through assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel"[45]. Accordingly, it is possible that a claim that equitable estoppel applies may be decided under state law, rather that federal law[46]. This is significant because (absent a choice-of-law clause) federal courts will generally apply the substantive law of the forum in which they sit (*e. g.*, a federal court in New York will apply New York law to the matter of equitable estoppel; while a federal court in Florida will apply Florida law to the same issue)[47], and there may be substantial differences between the contract law of each of the 50 states.

D) Equitable estoppel as a shield: signatories compelling non-signatories to arbitrate

Irrespective of whether a litigant is a signatory or a non-signatory to a contract containing an arbitration clause, that party may be bound to arbitrate when it exercises or claims rights under the contract. Indeed, courts have reasoned that parties resisting arbitration "cannot have it both ways. They cannot rely on the contract, when it works to their advantage, and repudiate it when it works to their disadvantage"[48].

Building on this notion, U.S. courts have held that a non-signatory may be estopped from denying a contract's arbitration clause when that

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44 *John Hancock Life Ins. v. Wilson*, 254 F.3d 48, 57 (2d Cir. 2001) (quoting *In re Herman Miller, Inc.*, 1998 WL 193213, at *4 (S.D.N.Y. Apr. 21, 1998), *aff'd Herman Miller, Inc. v. Worth Capital*, 173 F.3d 844 (2d Cir. 1999)).

45 556 U.S. 624, 631 (2009).

46 However, in *Carlisle*, the U.S. Supreme Court did not make clear whether the body of federal common law around estoppel was still intact. *See Grand Wireless, Inc. v. Verizon Wireless, Inc.*, 748 F.3d 1, 11-13 (1st Cir. 2014) (discussing *Carlisle* and noting that it is unclear whether the Court intended to displace the federal common law). *See, also Lawson v. Life of the S. Ins. Co.*, 648 F.3d 1166, 1172 (11th Cir. 2011) (applying Georgia law and holding that "*Carlisle* ... clarifies that state law governs that question of [a non-party can enforce an arbitration clause against a party], and to the extent any of our earlier decisions indicate the contrary, those indications are overruled or at least undermined to the point of abrogation by *Carlisle*").

47 *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

48 *Tepper Realty Co. v. Mosaic Tile Co.*, 259 F. Supp. 688, 692 (S.D.N.Y. 1966). The court continued, noting that "[t]o permit them to [repudiate the contract] would not only flout equity, it would do violence, we think, to the congressional purpose underlying the Federal Arbitration Act." *Id. See also Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GmbH*, 206 F.3d 411 (4th Cir. 2000) (compelling non-signatory to arbitrate where that party's case relied on the rights it claimed under a contract).

party has received a "direct benefit" under the contract. For instance, a non-signatory may be bound to arbitrate when it "knowingly accepted the benefits" of the contract[49], like a party who did not object to an agreement containing an arbitration clause when receiving it and who continued to use the trade name conferred by that agreement[50]. However, "[t]he benefits must be direct-which is to say, flowing directly from the agreement[51]," requiring, as one court explained, the signatory to show that the non-signatory "'knowingly exploit[ed]' the purchase contract and thereby received a direct benefit from the contract"[52].

In contrast, some courts have held that *indirect* benefits are insufficient to bind a non-signatory to an arbitration clause[53]. In one post-acquisition dispute, for instance, the non-signatory had acquired a company that was party to an agreement containing an arbitration clause[54]. When a dispute arose between the non-signatory/acquirer and the other signatory to the agreement, the latter argued that the non-signatory/acquirer benefited from the agreement because the agreement effectively eliminated it (the signatory) as the non-signatory/acquirer's competitor in the market. In rejecting this argument, the court found that this "indirect benefit [...] is not the sort of benefit which this Court envisioned as the basis for estopping a nonsignatory from avoiding arbitration"[55]. Indeed, the benefit to the non-signatory derived from its acquisition of the company, not from the agreement itself, and thus could not bind the non-signatory to arbitration[56].

E) Equitable estoppel as a sword: non-signatories compelling signatories to arbitrate

Some courts have also recognized that signatories may be compelled to arbitrate disputes with non-signatories when the dispute between these parties is closely connected or "intertwined" with arbitrable disputes. In these circumstances, the basic question to be answered is whether a signatory's consent to arbitrate with one party may bind that signatory to arbitrate with a *different* party, who is not even party to the arbitration agreement at issue. In answering the question, courts focus on the nature of the signatory's claims and the extent to which they relate to the contract containing the arbitration

49 *MAG Portfolio Consult, GmbH v. Merlin Biomed Group, LLC*, 268 F.3d 58, 61 (2d Cir. 2001).
50 *See also Deloitte Noraudit A/S v. Deloitte Haskins & Sells, U.S.*, 9 F.3d 1060 (2d Cir. 1993).
51 *MAG Portfolio Consult*, 268 F.3d at 61.
52 *Id.* at 62 (quoting *Thomson-CSF, S.A. v. Am. Arb. Ass'n*, 64 F.3d 773, 778 (2d Cir. 1995)) (alteration in original *MAG* opinion). *See also Flintkote*, 769 F.3d at 221-22 (refusing to compel arbitration under "knowing exploitation" theory of equitable estoppel).
53 *Bouriez v. Carnegie Mellon Univ.*, 359 F.3d 292, 295 (3d Cir. 2004) (holding that the non-signatory could not be compelled to arbitrate where there was "no evidence in the record to indicate that [non-signatory] directly benefitted from the [agreement]."). The court noted that the non-signatory became a minority shareholder in a corporation (which was a signatory to the agreement) for the "sole purpose" of funding a research project, but that there was no evidence that this project would produce any benefit to the signatory directly. *Id.*
54 *Thomson-CSF*, 64 F.3d 773.
55 *Id.* at 779.
56 *Id.*

clause, or to the claims that the signatory has already submitted to arbitration. Accordingly, courts find that a signatory may be bound to arbitrate if its claims are "intimately founded in and intertwined with" the agreement with the arbitration clause[57].

There are two circumstances in which courts have determined that this application of equitable estoppel may be appropriate: "[w]hen each of a signatory's claims against a non-signatory 'makes reference to' or 'presumes the existence of' the written agreement, the signatory's claims 'arise [...] out of and relate [...] directly to the [written] agreement'"[58]; and "'when the signatory raisers allegations of [...] substantially interdependent and concerted misconduct by both the non-signatory and one or more of the signatories to the contract'"[59]. Courts generally look for a close link between the claims or the parties, and the arbitration agreement. Accordingly, it is insufficient for a non-party to "make reference to" and "presume the existence of" an agreement containing an arbitration clause[60]. Rather, courts will require, for example, that the dispute be "linked textually" to a contract that included an arbitration clause, and "its merits are bound up with the dispute now being arbitrated [under that contract] between [signatory] and [third party signatory]"[61].

V – CONCLUDING REMARKS

As discussed in this article, U.S. courts have come to varied and sometimes conflicting decisions about the standards to be applied and what types of conduct may prevent or compel arbitration. One common thread is that actions may indeed have consequences – waiver and estoppel issues may turn on the parties' conduct, particularly conduct involving litigation and discovery. Indeed, the jurisprudence developed by U.S. courts anchors the analysis on party actions and what can be discerned about their intentions as to their intended dispute resolution mechanism. Parties who may find themselves before a U.S. court in a dispute where an arbitration clause exists should be mindful of the range of courts' approaches to these issues and the law – federal, state or foreign – that may apply to the matters at issue.

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57 *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.,* 10 F.3d 753, 758 (11th Cir. 1993), *abrogated on other grounds by Carlisle*, 556 U.S. 624.

58 *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999), *abrogated on other grounds by Carlisle*, 556 U.S. 624 (quoting *Sunkist*, 10 F.3d at 758) (alterations in original *MS Dealer* opinion).

59 *Id.* (quoting *Boyd v. Homes of Legend, Inc.*, 981 F. Supp. 1423, 1433 (M.D. Ala. 1997), *abrogated on other grounds by Davis v. S. Energy Homes, Inc.*, 305 F.3d 1268 (11th Cir. 2002)) (alterations omitted).

60 *Lawson*, 648 F.3d at 1172.

61 *Choctaw Generation Ltd. P'ship v. Am. Home Assurance Co.*, 271 F.3d 403, 407 (2d Cir. 2001). The court also observed the "tight relatedness of the parties, contracts and controversies." *Id.* at 406. In *Choctaw*, the dispute already in arbitration concerned the signatory's entitlement to liquidated damages under the contract, while the dispute before the court concerned whether the signatory could require the non-signatory to replenish a letter of credit in order to fund those liquidated damages, which depended on many of the same contract provisions. *See also Crawford Prof. Drugs, Inc. v. CVS Caremark Corp.*, 748 F.3d 249, 260 (5th Cir. 2014) (compelling arbitration where the signatories' claims were "founded in and inextricably bound up with the obligations imposed by the agreement containing the arbitration clause") (internal quotation marks and citation omitted).